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Union Canal Company of Pennsylvania

The Union Canal Company of Pennsylvania

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[1833]

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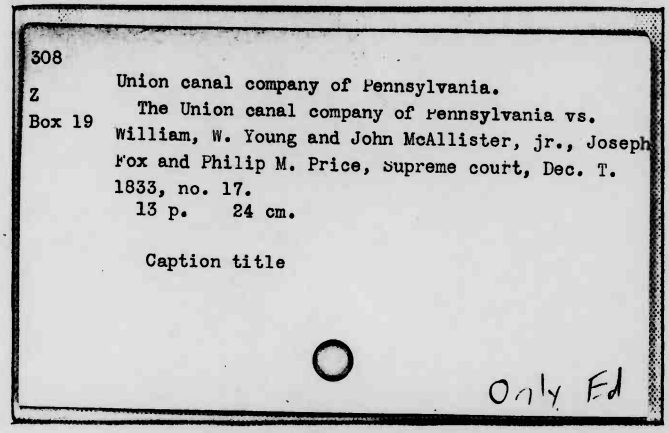

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Union canal company of Pennsylvania.
The Union canal company of Pennsylvania vs. William, W. Young and John McAllister, jr., Joseph Fox and Philip M. Price, Supreme court, Dec. T. 1833, no. 17.
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Box 19

THE UNION CANAL COMPANY OF PENNSYLVANIA

vs.

WILLIAM W. YOUNG AND JOHN McALLISTER, Jr., JOSEPH FOX AND PHILIP M. PRICE.

Supreme Court,
Dec. T. 1833,
No. 17.

This was an action of ejectment brought to recover a strip of land through the lands of William Young, deceased, (prout narr.) containing 135 perches, tried before his Honor M. C. Rogers, J., on the 29th day of February and 1st day of March, 1836; when, by consent of parties, a verdict was taken for the Plaintiffs, subject to the opinion of the Court upon the whole case.

On the trial of the cause the plaintiffs gave in evidence to sustain their claim as follows:

A bill in the hand writing of William Young, to wit:

"Delaware and Schuylkill Co.

		Dr.
1793.	To Wm. Young	
1st April.	135 perches land, Northern Liberties, at £87 10*s.* per acre,	$196 73
	Interest until 1st June, 1798,	60 98
		$257 71
1798.		
16th July.	To cash lent,	50 00
		$307 71

The survey of Robert Brooke, dated June 25, 1796, addressed to William Young, of the canal tract through William Young's White Hall farm. Prout survey.

Account drawn out by William Govet, Treasurer, Dec. 11th, 1799, crediting William Young for land, $257 71, and debiting him with certain shares of stock of the company in full payment of the balance of account. Prout account.

Five bills or accounts from William Young against Delaware and Schuylkill Canal Co. from Dec. 3, 1795, to March 6, 1799. Prout same.

Minute of Delaware and Schuylkill Canal Co. Dec. 17, 1799, (approving account with William Young, as liquidated by the Treasurer, and credits ordered to be given for the same on his stock at the periods when the money became due.)

Measurement of Nicholson's contract for cutting canal, dated April 26, 1796, one item "cutting in Wm. Young's lands 1230 yards at 7*d.* £37 17*s.* 6*d.*"

The Treasurer's account with the Company 31st December, 1799, taking credit for the amount of William Young's account credited him by resolution of 12th Dec. 1799. Prout account.

Resolution of Company of May 3, 1796, "That the contracts for the lands of Messrs. Morris & Young be deemed and taken to have been entered into and concluded at the times the respective contracts for working the same were made."

Resolution 30th June, 1796, "That Mr. Govett be directed to give credit to Mr. Morris and Mr. Young for the amount of their respective damages, as settled for their lands occupied by the track of the canal."

To show Mr. Young's presence at the Board, the minutes of April 23d 1796, of January 21 1796, 2d January 1800, 22d January 1800, and December 11, 1800. Prout same.

Receipts of William Young 7th May 1821 for ten shares of the Union Canal stock, in lieu of his Delaware and Schuylkill Canal stock. Prout same.

The certificates of his ten shares of stock in the Delaware and Schuylkill Canal, dated August 4, 1792, with credits for instalments, endorsed as paid at different times, from 31st October 1792 to 22d January, 1800. Prout same.

And the said defendants, to prove the issue on their part, produced *Frederick Brunner*, who testified, that in the year 1793, the Company dug out the canal in Young's property. He saw them at it. In 1794 they dug east of the Ridge Road. Mr. Young's property was west of the Ridge Road. One Mr. Johnson superintended. After it was kept as a pasture ground, shut up and nothing done to it. Was so kept in 1794. The fence was never removed away at any time. It was always kept up. They made a garden—the family that lived there on the front part. The rest was kept for grazing ground. The canal bottom was pastured with the rest About half was full of water, and the rest the cattle pastured in. The water was a nuisance, and brought fevers. Mr. Young opened a little to let it run off so as not to keep so much there. The people were a good deal unhealthy there with the ague. No body but Mr. Young appeared to be owner of that property as far as I know of. I have lived about a quarter of a mile from it now about twenty-four years. Before that I lived in the city. I knew the property very well before. Been often past—twice or three times a day. I had a pasture ground of one John Pemberton just above. Company went east in 1795. I never saw any thing more of them since. Nothing done to it since.

Being cross examined, he said:—The digging was three or four feet deep—some not so deep—and on Mr. Logan's place you could swim a horse. None of it was ten or fifteen feet. The fence I spoke of was round Mr. Young's property. There never was any alteration made in the fence at all. It stood as before. Young had, may be, ten acres it stood round. There were buildings there—a stable, house, and printing office. It was a few years after 1794

the printing office was put up. The fence was two or three rods, may be, from the digging in some places, and in some places further. In some a few acres from the digging. The fence was all round, and division fences too—some west and east. None of the fences were removed, cross fences or others, before 1794 or 1795, when the last of the digging was done. The garden was on another part than the canal—was a few rods off, may be. The cows used to run in the excavation. No other use was made of it. They used to run in it from the time the digging was first made, in 1793. Pegg's run ran across the canal. It began above Young. It was owing to a good deal of rain that the canal was filled. Part of the canal could not be drained. The last I saw of digging was in 1795, except where the buildings are put, the trench is there yet. I mean Fox and Price's houses.

Being re-examined—he said the people made a gap to go through to dig, and then fenced after—but did not pull the fence down at Young's. Don't know of any fence running across the canal since. Thirteenth street now runs across this ground, and the canal on the line of Thirteenth street was filled up. That street is now curbed and paved.

Being again cross-examined—he said Thirteenth street was put there three or four years ago. Was paved two years ago. Was opened and filled several years since.

Jacob Gardner, who swore, that he has lived in the district of Spring Garden 33 years last September. He was one of the Commissioners for sixteen years in that district, commencing in 1813. He collected the county taxes for nine years, commencing in 1820. He was assessor in 1821, and helped make the assessments six or seven years. He had known this White Hall estate thirty-four or thirty-five years. He knew it as Mr. Young's property; the whole of it. He never knew there was any division in it. It was always assessed to the estate of William Young during the time he had anything to do with the assessment and collection of taxes. He thinks Mr. Grigg, the tenant. paid him the taxes. There never was any part of this estate assessed to the Union Canal Company. They never paid any taxes on it. He never collected any taxes from it except the Young people. Mr. Young was landlord of Mr. Grigg.

The excavation east of the Ridge Road always remained. We filled the canal ground up east of the Ridge Road when it was occupied by Spring Garden street. It was curbed and paved by the Commissioners of the District of Spring Garden. I was superintendent four years. I had a great deal of it filled up. The Canal Company offered no resistance, and made no claim.

I never collected or assessed the taxes to the Union Canal Co. on any part of the route of this survey. The Columbia Rail-road is located from this end of Pratt's place partly to the bridge, on the canal survey—through Pratt's, Williams's, Fisher's, &c.

Being cross-examined:—He said, that as the Canal Company had not done what they undertook, we thought it reverted to the owners, and we taxed it to the owners, all except east of Pratt's, where a town plot is laid, and filed liens for taxes, where the owners were unknown. White Hall estate was always assessed as Young's. We took the whole number of acres to William Young, without any allowance for the canal. We had the old assessments to go by. We found it had always been assessed to Young, and went by it. The assessment does mention the number of acres. The taxes were $50 or $60 more or less. All the ground where it was excavated, the owners fronting on it paid the taxes. The assessors did consider they included the excavation to the adjoining owners. The assessments were always the same. Mr. Haws, who assessed for 18 years before me, never intimated that the Union Canal Company had any ground to be assessed. He (Mr. Haws) assessed for 18 years. His last year was in 1808. He took sick and I had to finish it for him that year. There is an assessment every year. He spoke of annual assessments. Robert Brooke was the first surveyor of the district. After his death Joseph S. Siddall, Mr. Ph. M. Price succeeded him, and Joseph Fox is Regulator now with P. M. Price. They have been such seven or eight years. They have reported extensive plans for the district for confirmation. It is necessary for them to go over the grounds of the district for the purpose. They give public notice of the opening of streets that parties may make objections. It was dug for a canal. That was generally known. The court requires a survey to be actually made on the ground.

Peter Hotz swore that he was Collector of taxes for the District of Spring Garden for 1829, 1830, and 1831. Had known the White Hall estate thirty or forty years. He never knew whose property it was till about seven years ago. He had understood it was assessed to William Young since he was collector. Don't remember about the digging of the canal there. Knows there was one dug there. Mr. Grigg paid me the taxes on the estate.

Jacob Gardner called again by plaintiffs—said Spring Garden street was opened through this property about four years since. Price and Fox had their office together. Price and Fox.

Anthony Grigg, being sworn, said:—I was tenant of the White Hall estate. In 1812 we moved there, and left it in 1830. It was rented of Wm. Young. The whole enclosure. We rented of no one else any part of it. I knew of no other claim during that time to that property of the ownership. I paid the taxes of that property. There were no taxes paid by any other person than me for any portion of it. The building front of the canal was the printing office. We first paid about $35, and afterwards about $60 taxes. In a wet season the bottom of the canal had water in it, in a dry it had weeds. It was a dry season to clear it of water. The canal was lower than Pegg's run, and for that reason the water stood in it. It drowned vegetation, and we supposed it helped to create the

intermittents of the neighbourhood. Fevers prevailed there very much. The damage was incalculable if it were all owing to that. There were large brick ponds in the neighbourhood. Sometimes we had not a man or a boy to work owing to the fever and ague. The cattle were turned in, and nothing prevented them going in, and they eat the grass on the bank. One fence ran across the canal east of Pegg's run, and divided the property into four or five lots—one near where Thirteenth street runs now. The property was always under fence from 1812.

Being cross-examined, he said:—The fence near 13th street we put up. It was not there before. In a few years after we went we put it up. At the west end there were 300 feet, and about 150 feet at the east end that were not excavated. This was left in its original state. The almost only way to get from one part to another was round these ends. We did not undertake to fill up the canal, or make alterations, but deepened the run.

Being re-examined, he said:—There was one brick yard 300 feet off directly across the Ridge Road. There was never a great deal of water there. There was another a quarter of a mile off. We considered the canal a part of the cause of the sickness, was one reason why we attempted to drain it.

Again cross-examined:—I always thought it was Mr. Young's property. I thought the fever was more after damming the Schuylkill. It was the next season after the damming that the hands were so bad. I did not know that the Canal Company had any claim at all. We made a fence along the bank of the canal about 200 feet from the stable to just east of Pegg's run, and then across it. Part of it on the bank of the canal. We put this up when we put up the other.

Thomas Nesbit, sworn, said:—I lived on this place, White Hall, near 8 years. I went apprentice with Mr. Young in 1798. That property was enclosed during all the time I knew it. It was at that time in the occupation of Mr. Young. He had tenants on it. The whole was enclosed and used so far as they could make any use of it. The bottom was useless so far as I know. There was a fence across it, dividing that portion between the printing office and Ridge Road, about 100 yards from the Ridge Road.—There was nothing done by the Canal Company during the time I knew it. There was no claim of property set up by them that I ever heard of. The excavation stopped from 100 to 150 feet from the west end, and from the east 90 or 100 feet. There was but one fence across the canal. It was there when I went there.—There was a small portion of the canal bed cut off by the fence, was in corn, put there by the tenant. It was the bed of the canal and east of the fence. Once or twice there was corn in it. The tenant's name was Adam Tice. He was old then, and not now to be found. It was in 1802 or 1803 that A. Tice raised one or two crops of corn. The water in the bottom was supposed to be prejudicial in my time. There was sickness experienced there then by

the people. The canal part was used for grazing with the rest of the place as far as it could be.

A. Grigg, again called by defendants, said:—My father moved to White Hall estate in 1808, and I occasionally visited him there. He rented from Wm. Young. The property continued enclosed during that time to 1812.

William W. Woodward, being sworn, deposed:—I cannot say positively how long I have known it, (White Hall) except in 1798 I was sick there. I was apprentice with W. Young in 1787. I remember seeing the canal dug round the printing office. In 1802 I was likewise there. And since I have seen it. I had a great deal of printing done there. One (book) I was looking at the other day, in 1806. That property has always been enclosed since I have been acquainted with it. I have taken a walk frequently round the lot. I never doubted any person being the owner but Mr. Young. I never heard of any other. The printing office was a strong building, and built for some strong purpose, or it would not have held as much as it did.

Being cross-examined, he said:—To the best of my recollection every part of the ground was enclosed. One evidence was, that in 1798 my wife said she had to climb the fence. It was a narrow building. Faced on the canal.

And further to sustain their defence, the defendants gave in evidence, deed from Samuel Miles and wife to William Young, dated 25th March, 1795; recorded 7th June, 1797, book 65 p. 280, for 8 acres 151 perches, including the premises in question, for the consideration of five thousand dollars. Prout deed.

Will of William Young, dated the 11th May, 1829, proved 16th May, 1829, devising his real estate to William W. Young and John McAllister, Jr., in trust to sell and pay debts, and to distribute the residue among his eight children, and the children of a deceased daughter. Prout will.

Deeds William W. Young and John McAllister, Jr., Trustees named in the will of William Young, to Joseph Fox and Philip M. Price, in fee simple, for their respective lots, dated 12th June, 1833, recorded 13th June, 1833, for the considerations therein mentioned. Prout deeds.

Agreement between Watering Committee and the Canal Co. 18th March, 1819, "for use of such part of the towing path and embankment as legally belongs to said Canal Company," by the City of Philadelphia. Prout same.

Resolutions of Union Canal Company, as follows:

"*Resolved*, That in case the bed of the old canal, on the eastern side of the Schuylkill, in Penn Township, Philadelphia County, shall be selected for the route of the contemplated rail-road, the company do agree to accept as damages, the fair reasonable value of the property taken, as it may be assessed by any disinterested tribunal."—December 31, 1829.

"Whereas, the resolution passed on the 31st December last, relative to the damages to be claimed for the passage of the Columbia and Philadelphia Rail Road through the bed of the old canal, on the eastern side of the Schuylkill, in Penn Township, Philadelphia County, has not been thought sufficiently explicit, therefore be it

"*Resolved*, That this Company do agree to accept as damages, the fair reasonable value of the ground taken, as may be assessed by any disinterested tribunal, without reference to the amount expended, or the work done on that part of the route of the canal."—January, 1830.

Resolution of the Company of Sept. 2, 1815, and Feb. 3, 1816, as follows:

"*Resolved*, That the Counsellor be requested to take such measures as he may think necessary for obtaining from the estate of the late William Hamilton, Esq. a compensation for the land he contracted to convey to the company."

"A settlement having been made on the 25th ulto. of the claim of the late Delaware and Schuylkill Canal Navigation Co. on the estate of William Hamilton, in conformity with the advice of the Counsellor of this Company, and four notes of said date, at eighteen months, drawn by James Hamilton, in favour of, endorsed by James Lyle having been received by the Treasurer, amounting to three thousand seven hundred and sixty-four dollars and thirteen cents, as appears by the copy of his receipt now read, and all the papers relative thereto having been delivered up as appears by the receipt of William H. Todd their Counsellor,

Resolved, That the said final settlement and delivery of the said papers be, and the same is hereby, approved and sanctioned."

And the following resolutions and agreements:

FEBRUARY 3d, 1834.

Resolved, That the Committee on Real Estate be authorized to open a negotiation with Mr. Burd, on the subject of the ground between the Columbia Rail Road and his late purchase from the University, and ascertain what he may be willing to pay for the same.

FEBRUARY 18th, 1834.

Resolved, That the proposition of Mr. Edward S. Burd to buy from this Company its title to the ground, lying between his late purchase from the University of Pennsylvania, and the North side of the Columbia Rail Road, and extending from ground formerly of Standish Forde and Joseph Ball, and now of Thomas Reeves, to ground late of Henry Harrison, and now of Henry Molier, be accepted, and that a deed be executed accordingly, and Mr. Burd's note for $1500 be taken in payment, to fall due on the first day of October next.

MARCH 5, 1834.

Resolved, That the deed be executed forthwith and delivered to Mr. Burd, upon his giving his note to the Company for $1500, payable on the first of January, with three months interest from the 1st of October.

JUNE 30th, 1835.

The Union Canal Company agree to sell to James S. Spencer the balance of land claimed and owned by them on the property purchased by him of Jacob G. Morris, known as Fountain Green, the quantity to be ascertained after deducting the ground occupied by the Columbia Rail Road, and the street called the Pennsylvania avenue on the south side of the Rail Road, and for this balance James S. Spencer agrees to pay at the rate of $1,000 per acre.

JAMES S. SPENCER.

I agree to purchase from the Union Canal Company the land owned by them on east side of the Columbia Rail Road, lying in front of land owned by me, formerly land of Thomas Biddle and James S. Spencer, for the sum of $2,500.

ISAAC S. LOYD.

Phila. 8th mo. 10, 1835.

Extract from the minutes of the Union Canal Company of Pennsylvania, August 6th, 1834.

"*Resolved*, That the President be authorized and requested to apply to all those who have either not given any deeds for lands paid for by either the late Schuylkill and Susquehanna Navigation, or the late Delaware and Schuylkill Canal Navigation, or to those in whose possession the deeds, drafts, surveys, instruments for surveying, or any other property belonging to either or both of the aforesaid late Companies may be supposed to be, and if refused, to request the Counsellor of the Company to take the necessary legal steps for the recovery of the same."

The following letter from the President of the Union Canal Company.

"*Philadelphia, Aug.* 27, 1814.

WM. YOUNG, ESQ., Rockland, near Wilmington.

Sir:—Agreeably to your favour of the 27th June, I hope to see you when in the city concerning the book case; and conformably to the above resolution, of the Board of the Union Canal Company of Pennsylvania of 6th instant, you'll please to have the deed prepared for the tract of land through White Hall Farm where the canal is dug, and for which you received credit on the books of the Company in December, 1799.

You'll no doubt be sensible that it is high time that regular vouchers should be procured for all lands paid for many years ago.

I am, respectfully, &c.

Defendants' Counsel called on plaintiffs' Counsel to produce Mr. Young's answer to the above letter, and the plaintiffs answered that none was ever received.

Eli K. Price, being affirmed, said:—As representing the defendants generally, since the suit began, I have made repeated inquiries of plaintiffs' Counsel to know whether the plaintiffs would settle the matter. Stated that defendants were willing to refund the principal and interest of the damages allowed to Mr. Young for their release of their claim upon the property. That plaintiffs refused to settle upon those terms.

Being cross-examined, said:—I did understand that Fox and Price were anxious to have the matter settled upon those terms, and understood the same from the other defendants. I have been acquainted with White Hall estate about five years. I am acquainted with the title of the Canal Company this side of the bridge. My attention has been drawn to the subject since being engaged in this suit. Not before. I was not consulted before in regard to the title.

And the plaintiffs further gave in evidence—

A statement of the damages paid on the route from the Delaware to the Schuylkill, to wit:

By agreement with owners, - - - -	$12,387 41
By assessment of Jury, - - - - -	3,108 33

County assessment book for 1821, rating William Young's property at eight acres. Mortgage book A. M. 15 p. 559, &c. Mortgage Joseph Fox to John McAllister, for $1547 77, dated 12th June, 1833, partly on property in question; and mortgage from Philip M. Price to John McAllister for, $, dated 12th June, 1833, partly on property in question.

Samuel Norris affirmed, said:—I served the original of this notice on Mathew Clark, head workman, 26th of June, 1833, I understood of Fox & Price's houses. Part of the cellar walls had been put up. Mr. Clark said he would proceed, and was indemnified by somebody. I believe he said he would proceed, and he would be held good against any damages.

Being cross-examined, he said:—It was the only notice I was present at the service of. I know of no other notice having been served on him. These officers—Mr. Gratz, Morris &c. met me in the street, and asked me to walk out with them.

Notice dated 26th June, 1833, as follows:

Philadelphia, 26th June, 1833.

SIR:—You are hereby notified that the ground excavated for the late Delaware and Schuylkill Canal Company, and on which you are now engaged erecting buildings, is the property of the Union Canal Company of Pennsylvania, and you are hereby required to desist from the further prosecution of the same.

Your obt. servt.

WILLIAM READ,

Prest. of the Union Canal Company of Pennsylvania.

PHILIP M. PRICE.

A true copy of the original, of which were delivered one to Philip M. Price, Esq. and the other to Joseph Fox, Esq. in presence of George W. Harvey, June 28, 1833.

George W. Harlan.—I served the original of this notice on Mr. Price and Mr. Fox. Price, in 6th above Noble, at his office—Fox, at his house in Green street. Mr. Fox said he would proceed with the work, they might take what measures they pleased. Don't recollect what Mr. Price said.

Notice read as follows:

MR. MATHEW CLARK,

Sir:—You are hereby notified that the ground excavated for the late Delaware and Schuylkill Canal Company, and on which you are now engaged erecting buildings, is the property of the Union Canal Company of Pennsylvania, and you are hereby required to desist from the further prosecution of the same.

WILLIAM READ,
Prest. of the Union Canal Company of Pennsylvania.

Philadelphia, 26th June, 1833.

Thomas P. Roberts sworn.—I cannot distinctly recollect the person. I believe the person who brought me this note came to the office of the Company. I cannot recollect the conversation. I am not certain whether the surveys were then shewn him. They were at another time. He presumes relative to the lands in Spring Garden I am not certain that they were shewn in consequence of this note. I can't tell you whether he examined the plans. At a subsequent time I think they were shewn him. I don't know who brought the note.

Being cross-examined:—There are several detached surveys I think. Can't say in what part of the route the lands of Mr. Williams lie. I can't say whether the plan of ground near Wissahiccon road includes ground near Fair Mount.

Note from J. H. Williams. read as follows:

DEAR SIR:—Mr. Price, one of the Surveyors of the District of Spring Garden, wishes to see a plan of the canal, between 3d and 4th streets from Schuylkill, to enable him to establish the boundaries of a lot, at the corner of 4th street and Callowhill, running back to the canal. I do not know if there is any reason for refusing this, but I refer it to you for your opinion.

Yours truly,

Nov. 11th, 1831. H. J. WILLIAMS.

And the defendants gave in evidence the Company's annual report for 1821, and read as follows:—"There appears also to be vested in the Company a part of the ground occupied by the Delaware and Schuylkill Canal, the cost of which it is believed to exceed 4,000 dollars, but the precise amount has not been ascertained."

Plaintiffs and defendants having closed their testimony, defendants filed an obligation to refund to the plaintiffs, in case of a verdict and judgment in their favor, the principal and interest of the damages allowed William Young, provided the Court should be of opinion that the defendants are equitably bound to refund the same.

UNION CANAL COMPANY OF PENNSYLVANIA.
vs.
YOUNG AND OTHERS.
} *S. C. Dec. T.* 1833.

Specification of the points on which the defendants rely under the motion for a new trial.

1. The plaintiffs have no right of entry into the premises in question, having had no possession thereof within twenty-one years before the commencement of this action.

2. The plaintiffs have no right of entry into the premises, because the defendants and their ancestor have had the exclusive, absolute and adverse possession of the premises for twenty-one years and upwards before the commencement of the present suit.

3. The defendants are protected by the statute of limitations, because they enclosed round the entire tract in question, cultivated, grazed, and fenced along and across the same, upwards of twenty-one years before the commencement of this action, whereby plaintiffs were ousted, and defendants have ever since so maintained their possession.

4. The plaintiffs lost their right of entry, if any they ever had, by omitting to pay any part of the taxes assessed on the premises in question for twenty-one years, and suffering the defendants to pay the whole taxes on the same for twenty-one years and upwards, before this action was begun, whereby it should have been left to the jury to presume that the plaintiffs had been ousted and barred by the statute of limitations.

5. The plaintiffs have no right of entry into the premises in question, because they have not shown that they intend to occupy the same "for the purpose of making, digging and perfecting" a canal between the river Delaware and Schuylkill, the only purpose for which the Delaware and Schuylkill Canal Company were authorized by their charter to take or acquire the said property.

6. The plaintiffs have no right of entry into said premises, because they have abandoned the purpose of making such canal, by neglect of all work upon it for forty years, by never having acquired a continuous right to occupy the soil from one river to the other, by releasing to the adjoining owners rights that they may have acquired, by relinquishment of the route to the Commonwealth for aRail-way, and the occupation of other portions of it by publicstreets.

7. The plaintiffs have no right of entry into said premises, because the State has, by supplemental acts of Assembly, accepted by the plaintiffs, prohibited them from making the canal from the Schuylkill to the Delaware.

8. The plaintiffs have no right of entry into said premises, unaccompanied by a satisfactory demonstration of their power and intention, to make the said canal, because they could not constitutionally take the property of a citizen against his consent, except for the public use authorized by their charter, and the agreement of parties to accept damages, was not intended to confer any greater interest than the Company could acquire by an adversary inquisition and judgment of the Court thereon.

9. That the only title that the Delaware and Schuylkill Canal Company could acquire consistently with their charter, whether by agreement with the parties, or by inquisition and judgment of the Court, was a base, qualified and determinable fee, depending upon the public use of the soil as aforesaid, and not a fee simple, "generally, absolutely and simply."

10. That by the agreement between the Delaware and Schuylkill Canal Co. and William Young, the parties did not intend a purchase and sale of the title to the land for any estate or transferable interest therein, but that the former should merely acquire an easement, they paying "*damages* as settled for lands *occupied*" for that purpose, from which easement the premises are now discharged by abandonment, and the acts aforesaid relinquishing the franchise; and if an easement, no ejectment will lie therefor.

11. That whatever may have been meant by the parties as to the nature of the claim, title or interest to be acquired by the Delaware and Schuylkill Canal Company, the said Company never did acquire a legal title in the premises, but merely an executory contract or equitable interest, liable to be repelled by any countervailing equity.

12. That the land having cost William Young five hundred and sixty dollars an acre, and the Company having allowed him in damages to the credit of his stock, but two hundred and thirty-three dollars and thirty-three cents per acre, the larger consideration to be paid to William Young, were the stipulated benefits of the canal to his property, which the Company have failed to make according to their charter and contract with Wm. Young.

13. That any equity the plaintiffs could derive from the payment of the damages has been fully neutralized by the damage sustained by the digging of the soil, and injury thereby to pasturage and health; and if that be not sufficient, by the agreement of record by defendants to refund the principal and interest of said damages, if the Court shall be of opinion that any such obligation equitably rests on the defendants.

14. The plaintiffs have slept too long upon their rights, if any they had, and equity will not aid their stale claim—equity adopts the statute of limitations.

15. Circumstances having greatly changed in respect to internal improvements, the ability and purposes of the plaintiffs, value of property, so that neither party could now derive from

the execution of the contract the expected benefits, it would be inequitable to enforce the specific performance of it.

16. After the lapse of time that has taken place, under the circumstances in evidence in this case, a release of all claim from the Company will be presumed.

17. The Delaware and Schuylkill Canal Company was dissolved in 1811, when the Union Canal Company was formed, and thereby all title to the premises in question, if any they had, reverted to William Young, and was never acquired by the present plaintiffs.

18. The defendants, Fox and Price, are record purchasers of the premises occupied by them, without notice of plaintiff's title, and unaffected by it, whatever it may be.

19. Because the evidence is insufficient to support the said verdict, and because it is contrary to equity and law.

ELI K. PRICE, for Defendants.

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END OF
TITLE